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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 100819383-1652-02]

RIN 0648-BA18

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Management Area; Limited Access Privilege Program

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues regulations implementing Amendment 93 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). These regulations amend the Bering Sea and Aleutian Islands Amendment 80 Program to modify the criteria for forming and participating in a harvesting cooperative. This action is necessary to encourage greater participation in harvesting cooperatives, which enable members to more efficiently target species, avoid areas with undesirable bycatch, and improve the quality of products produced. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the FMP, and other applicable law.

DATES: This final rule is effective on [insert 30 days after publication in the FEDERAL REGISTER], except for the provisions at § 679.91(h)(3)(ii) and (iii), which are effective [insert date of publication in the FEDERAL REGISTER].

ADDRESSES: Electronic copies of Amendment 93, the final Environmental Assessment (EA) and Regulatory Impact Review (RIR); Initial Regulatory Flexibility Analysis (IRFA); and Final Regulatory Flexibility Analysis (FRFA) prepared for this action are available from the NMFS Alaska Region website at <http://alaskafisheries.noaa.gov>. The proposed rule to implement Amendment 93 also may be accessed at this website.

FOR FURTHER INFORMATION CONTACT: Gwen Herrewig, 907-586-7228.

SUPPLEMENTARY INFORMATION: The groundfish fisheries in the exclusive economic zone off Alaska are managed under the FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act. Amendment 80 to the FMP implemented the Amendment 80 Program. Regulations implementing Amendment 80 were published on September 14, 2007 (72 FR 52668). These regulations are located at 50 CFR part 679.

Background

The Amendment 80 Program is commonly known as a limited access privilege program. Eligible fishery participants may receive exclusive access to specific fishery resources if certain conditions are met. Under the Amendment 80 Program, NMFS issues a quota share (QS) permit to a person holding the catch history of an original qualifying non-American Fisheries Act (AFA) trawl catcher/processor that met specific criteria designated by Congress under the Capacity Reduction Program (CRP) (Public Law 108-447). NMFS determined that 28 vessels met the criteria specified in the CRP. These vessels comprise the originally qualifying Amendment 80 vessels. NMFS determined the amount of QS issued based on the catch history of six Amendment 80 species (Atka mackerel, Aleutian Islands Pacific ocean perch, flathead sole, Pacific cod, rock sole, and yellowfin sole) in the Bering Sea and Aleutian Islands

Management Area, from 1998 through 2004, derived from the 28 originally qualifying non-AFA trawl catcher/processors.

Generally, the Amendment 80 Program is intended to facilitate the formation of fishing cooperatives, which have been shown to improve fishery management. Amendment 80 participants who join a fishing cooperative receive cooperative quota, which are exclusive harvest privileges for a portion of these fishery resources. The allocation of CQ allows vessel operators to make operational choices to improve fishing practices and reduce discards of fish, because the incentives to maximize catch rates to capture a share of the available catch are removed. Cooperatives fishing under an exclusive harvest privilege can tailor their operations to more efficiently target species, avoid areas with undesirable bycatch, and improve the quality of products produced. Participants in the limited access fishery do not receive an exclusive harvest allocation, and may have little incentive to coordinate harvest strategies if they perceive a benefit by competing with other participants in a race for fish. A person who chooses to join a cooperative must designate the catch derived from his QS to the cooperative, the specific vessels that will be fishing for that cooperative, and the License Limitation Program (LLP) licenses assigned to each designated vessel.

Amendment 93 results in two changes to the Amendment 80 Program. First, it reduces the minimum number of persons and licenses required to form a harvesting cooperative. Previously, the Amendment 80 program required that a minimum of three unique persons and nine QS permits must be assigned to a cooperative. Reducing the number of unique persons and number of QS permits could provide additional opportunities for QS holders to establish cooperative relationships that could reduce the number of participants engaged in the race for fish. The Council and NMFS expect that relaxing the Amendment 80 cooperative formation

standards by reducing the number of QS permits that must be assigned and the number of unique vessel owners required will (1) provide additional opportunities to QS holders to form cooperatives because more relationships are possible; (2) diminish the negotiating leverage of vessel owners who may be necessary to meet the threshold requirements under more stringent cooperative formation standards; (3) reduce the potential risk of any one company being unable to negotiate settlement and be able to fish only in the limited access fishery; and (4) reduce the incentive for members of a cooperative to attempt to create conditions that are unfavorable for certain fishery participants to form a cooperative.

The second revision under Amendment 93 requires that a person assign all QS permits either to one or more cooperatives or to the limited access fishery, but not to both during the same calendar year. This revision is needed to reduce the incentive for a cooperative member to prevent another person from forming a cooperative in order to force them into a race for fish in the limited access fishery. Excluding a person from cooperative membership could benefit a cooperative, or specific members of a cooperative who choose to participate in both a cooperative and the limited access fishery. For example, if a cooperative member who holds multiple QS permits and vessels can assign one vessel and QS permit to the limited access fishery and another vessel and QS permit to a cooperative, that member could harvest more fish in the limited access fishery than would be derived from their QS if it were assigned to a cooperative. A person participating in both a cooperative and the limited access fishery has an incentive to exclude participants in the limited access fishery from joining a cooperative or creating an additional cooperative. For example, a person participating in a cooperative and the limited access fishery could seek to exclude a person from fishing in a cooperative if the person to be excluded was unlikely to be able to join another cooperative. Under that scenario, the

person excluded from a cooperative could be forced into the Amendment 80 limited access fishery. If the person participating in the cooperative also assigned a vessel to the Amendment 80 limited access fishery that was capable of effectively competing against the other Amendment 80 limited access fishery participants, that person could maximize their catch in a race for fish. Under that scenario, a person with participation in both an Amendment 80 cooperative and the limited access fishery would have little incentive to allow a person to join a cooperative because they would lose access to fish that would otherwise be available in the Amendment 80 limited access fishery.

The revision under Amendment 93 requiring a person to assign all QS permits either to a cooperative or to the limited access fishery, but not both, is not applicable until the first fishing year 2 years after the final rule effective date. Because this final rule is effective in 2011, this requirement does not apply until the 2014 fishing year and QS holders must assign all QS permits and vessels to one or more cooperatives or to the limited access fishery by the Amendment 80 annual cooperative application deadline of November 1, 2013. The 2-year delay allows vessel owners time to coordinate with other participants in the fishery and determine if they will assign all of their QS permits to either one or more cooperatives, or the limited access fishery. NMFS will not allow owners to assign QS permits or vessels to one or more cooperatives and the Amendment 80 limited access fishery on the annual cooperative applications submitted to NMFS by the November 1, 2013 deadline.

NMFS published a notice of availability for Amendment 93 on July 28, 2011 (76 FR 45219). The public comment period on Amendment 93 ended on September 26, 2011. On August 10, 2011, NMFS published a proposed rule to implement Amendment 93 (76 FR 49417). The public comment period for the proposed rule ended on September 9, 2011. Additional

information on this action was provided in the preamble of the proposed rule and is not repeated here.

NMFS received three comments on Amendment 93 and the proposed rule during the public comment period for the proposed rule. One public comment did not directly address Amendment 93 or the proposed rule, but was a general comment related to the Federal Government's management of marine resources and provided a general criticism of fishery management. The other two comments were in support of this action. All comments are addressed in the Response to Comment section for this rule. The Secretary of Commerce approved Amendment 93 on October 25, 2011. No modifications were made to the proposed rule.

Response to Comments

Comment 1: The commenter raises general concerns about NMFS' management of fisheries, asserting that fishery policies have not benefited American citizens. The commenter also believes that NMFS should not be allowed to manage fisheries.

Response: This comment is not specifically related to the proposed rule. The comment recommends broad changes to fisheries management and provides opinions of the Federal Government's general management of marine resources that are outside the scope of this action. The commenter did not raise new relevant issues or concerns that have not been addressed in the preamble to the proposed rule or the EA/RIR/FRFA prepared to support this action.

Comment 2: The commenter strongly supports Amendment 93 and the proposed regulations. The commenter strongly urges NMFS to implement the action at the earliest possible time, preferably in time to be effective for the 2012 fishing year, in order to maximize the benefits of this amendment.

Response: NMFS agrees that this action is beneficial to participants in the Amendment 80 sector and should be implemented as soon as possible.

Comment 3: The commenter supports Amendment 93 and continues to support the objective to promote full participation of Amendment 80 vessels in cooperatives to facilitate optimal harvest of Amendment 80 QS through intra and inter-sector trades throughout the year. The commenter anticipates that Amendment 93 will result in open and productive interactions between all cooperatives within the Amendment 80 sector, but expressed concern about cooperatives that may be unwilling to transfer unharvested allocations, which could result in harvest of an Amendment 80 species that is less than the TAC established for that species. The commenter is concerned that unharvested cooperative allocations of Amendment 80 species could result in the Council reducing the TAC of Amendment 80 species because it assumes the unharvested QS indicates that TACs were set too high. For this reason, the commenter may seek changes in the allocation system in the future if some cooperatives are unwilling to transfer unused QS.

Response: NMFS agrees that Amendment 93 promotes full participation of Amendment 80 vessels in cooperatives and expects productive interactions between Amendment 80 cooperatives. The commenter may approach the Council in the future with suggestions for changes to the Amendment 80 program.

Changes from the Proposed Rule

NMFS did not make any changes to the proposed rule published on August 10, 2011 (76 FR 49417).

Classification

The Administrator, Alaska Region, NMFS, determined that FMP Amendment 93 is

necessary for the conservation and management of the BSAI groundfish fishery and that it is consistent with the MSA and other applicable laws.

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

Pursuant to 5 U.S.C. 553(d)(3), the Assistant Administrator for Fisheries, NOAA, finds good cause to waive the 30-day delay in effectiveness for 50 CFR 679.91(h)(3)(ii) and (iii) as amended in this rule. The 30-day delay in effectiveness of these sections is impracticable and contrary to the public interest. Amendment 93 reduces the number of unique persons and number of QS permits required to form a cooperative in the Amendment 80 Program. Reducing the number of unique persons and number of QS permits can provide additional opportunities for QS holders to establish cooperative relationships that could reduce the number of participants engaged in the race for fish. The annual Amendment 80 Cooperative Quota Permit Application deadline is November 1 of each year and NMFS has informed Amendment 80 participants that they may submit cooperative applications under the minimum formation thresholds established by Amendment 93. However, NMFS cannot process these applications until the new minimum formation thresholds contained in 50 CFR 679.91 (h)(3)(ii) and (iii) are effective. Immediate effectiveness of these sections will allow NMFS to process applications submitted for Amendment 80 cooperatives in a timely manner which will provide the fishing industry the earliest possible opportunity to plan and conduct its fishing operations with respect to new cooperative formation requirements before the start of the 2012 fishing year in January. A 30-day delay in effectiveness would prevent NMFS from processing Amendment 80 cooperative applications in a timely manner and would create uncertainty within the industry and frustrate the affected industry's ability to plan for the upcoming fishing year. For these reasons, NMFS finds

good cause to waive the 30-day delay in effectiveness under 5 U.S.C. 553(d)(3) for 50 CFR 679.91(h)(3)(ii) and (iii). NMFS is not waiving the 30-day delay in effectiveness for 50 CFR 679.91(h)(3)(xii) because immediate effectiveness of that section is not necessary.

Pursuant to section 604 of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., a FRFA was prepared for this action. The FRFA incorporates the IRFA, and includes a summary of the significant issues raised by public comments in response to the IRFA, and NMFS' responses to those comments, and a summary of the analyses completed to support the action. A copy of the EA/RIR/FRFA prepared for this final rule is available from NMFS (see ADDRESSES). A description of this action, its purpose, and its legal basis are contained at the beginning of the preamble to this final rule and are not repeated here.

NMFS published the proposed rule to implement Amendment 93 on August 10, 2011 (76 FR 49417), and the public comment period closed on September 9, 2011. An IRFA was prepared and summarized in the "Classification" section of the preamble to the proposed rule. NMFS received three public comments on Amendment 93 and the proposed rule. None of these comments addressed the IRFA.

This action modifies the cooperative formation standards and requirements for assigning QS and Amendment 80 vessels to either a cooperative or the limited access fishery. Six alternative approaches for modifying cooperative formation criteria were considered. Alternative 1: Status quo. A minimum of three unique QS holders holding at least nine QS permits are required to form a cooperative. Alternative 2: Reduce the number of unique QS holders required to form a cooperative from the existing three QS holders to two or one unique QS holder. Alternative 3: Reduce the number of QS permits required to form a cooperative from the existing nine permits to eight, seven, six, or three permits. Alternative 4: Reduce both the number of

unique QS holders and the number of QS permits required to form a cooperative (combination of Alternatives 2 and 3 above). Alternative 5: Allow a cooperative to form with a minimum of three unique QS holders holding at least nine QS permits (status quo), or a single or collective group of entities that represent 20 percent, 25 percent, or 30 percent of the sector QS.

Alternative 6: Require that a cooperative accept all persons who are otherwise eligible to join a cooperative subject to the same terms and conditions as all other members. The Council recommended Alternative 4, reducing the number of unique QS holders to two unique persons and reducing the number of QS permits required to form a cooperative to seven QS permits, as its preferred alternative. The Council rejected Alternatives 2, 3, 5, and 6 because public comments and the analysis prepared for this action indicated these alternatives likely would not offer substantially greater cooperative formation opportunities or have substantially different economic implications than the status quo alternative.

Two alternative approaches were considered for the QS and vessel assignment provision. Alternative 1: status quo. QS holders with multiple QS permits and vessels may assign those QS permits and vessels to one or more cooperatives and the limited access fishery. Alternative 2: QS holders with multiple QS permits and vessels may assign those QS permits and vessels to one or more cooperatives or the limited access fishery, but not both. Alternative 2 would be effective two years after the effective date of the final rule. The Council rejected the status quo alternative because experience under the Amendment 80 program has indicated that the status quo cooperative formation criteria may disadvantage limited access fishery participants and create incentives to discourage fishing cooperative formation.

Collectively, the alternatives and options considered under these two proposed actions provided a broad suite of alternatives from which the Council chose to modify the factors

affecting cooperative formation.

The overall impact of this action to small entities is expected to be positive. Impacts from Amendment 93 would accrue differentially (i.e., some entities could be negatively affected and others positively affected). The Council considered an extensive range of alternatives and options as it designed and evaluated the potential for changes to the Amendment 80 sector, including the “no action” alternative.

Compared with the status quo, the action selected by the Council minimizes the adverse economic impacts on the directly regulated small entity. The alternatives implemented in this final rule are expected to provide greater opportunity for cooperative formation among the various Amendment 80 businesses. In no case are these combined impacts expected to be substantial. Alternative 4 for the cooperative formation standards, which requires two unique persons and seven QS permits to form a cooperative, is not expected to adversely affect the existing Amendment 80 cooperatives, but could provide additional cooperative formation opportunities for participants in the Amendment 80 limited access fishery. For the QS and Amendment 80 vessel assignment component of this action, Alternative 2 will reduce the incentive for owners of multiple vessels to exclude a person from a cooperative. This alternative is expected to enhance the likelihood of cooperative formation.

For purposes of a FRFA, the U.S. Small Business Administration has established that a business involved in fish harvesting is a small business if it is independently owned and operated, not dominant in its field of operation (including its affiliates), and has combined annual gross receipts not in excess of \$4.0 million for all its affiliated operations worldwide. The FRFA estimates that 28 non-AFA trawl catcher/processors could generate Amendment 80 QS, based on the provisions of the Amendment 80 Program. Those persons who apply for and receive

Amendment 80 QS are eligible to fish in the Amendment 80 sector, and those QS holders will be directly regulated by this action. Based on the known affiliations and ownership of the Amendment 80 vessels, all but one of the Amendment QS holders are categorized as large entities for the purpose of the RFA under the principles of affiliation, due to their participation in a harvest cooperative or through known ownership of multiple vessels, co-ownership and “shares” ownership among vessels, and other economic and operational affiliations. Thus, the FRFA estimates that only one small entity will be directly regulated by the proposed action. It is possible that this one small entity could be linked by company affiliation to a large entity, which may then qualify that entity as a large entity, but complete information is not available to determine any such linkages.

This final rule will not change existing reporting, recordkeeping, or other compliance requirements. This final rule does not contain a collection-of-information requirement subject to the Paperwork Reduction Act.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, NMFS has posted a small entity compliance guide on its website at <http://alaskafisheries.noaa.gov/sustainablefisheries/amds/80/default.htm>. A letter to permit holders that also serves as a small entity compliance guide was prepared.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: November 1, 2011.

John Oliver,
Deputy Assistant Administrator for Operations,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 679 is amended as follows:

PART 679-- FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 et seq.; 1801 et seq.; 3631 et seq.; Pub. L. 108-447

2. In § 679.91, paragraphs (h)(3)(ii), (h)(3)(iii), and (h)(3)(xii) are revised to read as follows:

§ 679.91 Amendment 80 Program annual harvester privileges.

* * * * *

(h) * * *

(3) * * *

(ii) What is the minimum number of Amendment 80 QS permits that must be assigned to an Amendment 80 cooperative to allow it to form?	Any combination of at least seven Amendment 80 QS permits which would include Amendment 80 LLP/QS licenses.
(iii) How many Amendment 80 QS holders are required to form an Amendment 80 cooperative?	At least two Amendment 80 QS holders each of whom may not have a ten percent or greater direct or indirect ownership interest in any of the other Amendment 80 QS holders.
* * * * *	
(xii) Can an Amendment 80 QS permit, Amendment 80 LLP license, or Amendment 80 vessel be assigned to an Amendment 80 cooperative and the Amendment 80 limited access fishery?	No, an Amendment 80 QS permit, Amendment 80 LLP license, or Amendment 80 vessel assigned to an Amendment 80 cooperative may not be assigned to the Amendment 80 limited access fishery for that calendar year. Prior to the 2014 fishing year, a person holding multiple Amendment 80 QS permits, Amendment 80 LLP licenses, or owning multiple Amendment 80 vessels is not required to assign all Amendment 80 QS permits, Amendment 80 LLP licenses, or Amendment 80 vessels to the same Amendment 80 cooperative or the Amendment 80 limited access fishery. Starting with the 2014 fishing year and thereafter, a person holding multiple Amendment 80 QS permits, Amendment 80 LLP licenses, or owning multiple Amendment 80 vessels must assign all Amendment 80 QS permits, Amendment 80 LLP licenses, or Amendment 80 vessels to either one or more Amendment 80 cooperatives, or the Amendment 80 limited access fishery.

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